No. 87-2084 (5)
No. 88-214 (5)

In The

Supreme Court of the United States

October Term, 1988

NORMAN JETT,

Petitioner,

vs.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

FRANK GILSTRAP *
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222

Counsel for Petitioner

*Counsel of Record

PETITION FOR CERTIORARI IN CASE NO. 87-2084 FILED JUNE 21, 1988

CROSS-PETITION FOR CERTIORARI IN CASE NO. 88-214 FILED JULY 21, 1988

CASES CONSOLIDATED AND CERTIORARI GRANTED IN BOTH CASES NOVEMBER 7, 1988

QUESTIONS PRESENTED

1. Must a local government employee who claims job discrimination on the basis of race show that the discrimination resulted from official "policy or custom" to recover from the employer under 42 U.S.C. § 1981?

2. Was the Fifth Circuit's decision, that a local government could be liable for damages under 42 U.S.C. § 1981 and § 1983 because of an employee transfer decision made by a non-policymaker, who was not following official policy or custom, contrary to the recent decision of *City of St. Louis v. Praprotnik*, _____U.S._____, 108 S. Ct. 915, 99 L.Ed.2d 107 (1988)?

LIST OF ALL PARTIES

Petitioner	Norman Jett
Respondent	Dallas Independent School District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

No. 87-2084
No. 88-214

NORMAN JETT,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

OPINIONS BELOW

The initial Court of Appeals opinion is reported at 798 F.2d 748, and is reprinted in the Appendix to the Petition for Writ of Certiorari ("Pet. App."), at 1A-32A. The Fifth Circuit's order on rehearing, supplementing its initial opinion, is reported at 837 F.2d 1244, and is reprinted at Pet. App. 33A-44A. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is unreported and is printed at Pet. App. 45A-63A.

JURISDICTION

The Fifth Circuit entered its judgment on August 27, 1986, and issued its mandate on February 5, 1988. Pet. App. 66A-67A. Norman Jett timely filed his petition for writ of certiorari on June 21, 1988, and the Dallas Independent School District timely filed its cross-petition on July 21, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following statutes and constitutional provisions are involved in this case:

United States Constitution
- Thirteenth Amendment
- Fourteenth Amendment (Sections 1 and 5)
- Fifteenth Amendment

United States Code
18 U.S.C. § 241; 18 U.S.C. § 242; 28 U.S.C. § 1331; 28 U.S.C. § 1343; 42 U.S.C § 1981; 42 U.S.C. § 1983; 42 U.S.C. § 1988;

Revised Statutes (1874)
Sections 5506, 5507 and 5508

Statutes
Civil Rights Act of April 9, 1866 (c. 31, 14 Stat. 27), the "Civil Rights Act of 1866."

Civil Rights Act of May 31, 1870 (c. 114, 16 Stat. 140), the "Enforcement Act of 1870."

Civil Rights Act of April 20, 1871 (c. 114, 17 Stat. 13), the "Ku Klux Klan Act of 1871."

The above-cited constitutional provisions and statutes are reprinted in full in the Joint Appendix (hereafter "Jt. App.").

STATEMENT

Background

Norman Jett became an employee of the Dallas Independent School District ("DISD") in 1957. In 1962 he became a teacher and assistant football coach at South Oak Cliff High School. In 1970 he became head coach and athletic director, while retaining his teaching position. During this period the racial composition of the school was changing from predominantly white to predominantly black. By 1982, when the events that gave rise to this litigation arose, the South Oak Cliff student body was virtually all black, and Jett was the only white coach.

Jett apparently served well as a teacher. He was regularly evaluated and his marks were uniformly high. Tr. 203-205, 264-266. It was as a football coach, however, that he distinguished himself. During his thirteen years as head coach, Jett's South Oak Cliff teams won over eighty percent of their games and became the dominant high school team in Dallas. Two hundred fifty of his players won college scholarships and forty three of them went on to play professional football. Tr. 220-221, 223-224.

What proved to be Jett's last game occurred in the late fall of 1982, when his team lost a playoff game to Plano High School before a large turnout in the Cotton Bowl. The loss was a bitter one, and it deeply affected Frederick Todd, who had served as South Oak Cliff principal since 1975.

Despite the team's great success, Todd had not been totally satisfied with Jett. On several occasions Todd had urged Jett to recruit promising middle school athletes, but the practice was forbidden by DISD regulations, and Jett had refused. Jett's comments to the local newspapers — that many of his players could not meet new academic standards for college athletes — also rankled Todd.

Todd recommends Jett's removal

Immediately following the Plano loss, Todd criticized Jett for failing to follow the "game plan." He also quizzed Jett about an absurd rumor that Jett had been bribed to "throw the game." Soon afterward he gave Jett an unsatisfactory teacher evaluation, the first in Jett's twenty-six years with

DISD. On March 15, 1983, Todd summoned Jett to his office and told him that he was recommending his removal as athletic director/head coach.

Two days later Todd sent a letter to John Kincaide, DISD athletic director, formally recommending that Jett be removed as athletic director/head coach. Todd's purported reasons, as set forth in this letter and in his testimony, were Jett's "improper" comments to the newspapers, his failure to recruit junior high school athletes, and his failure to follow the "game plan" in the Plano game. Tr. 77-79, 86-90, 100-108, 174-175, 204, 207.

The jury would later find that Todd was motivated by Jett's race and by Jett's exercise of First Amendment rights, and that the stated reasons were pretextual. Jt. App. 36-38, 42-44. These findings were upheld by the Fifth Circuit and are no longer in dispute. Pet.App. 14A-20A.

DISD policies and practices

Under DISD practices Jett's removal as athletic director/head coach was treated as a "reassignment". No loss in salary was contemplated. And, while the DISD Board of Trustees had approved written policies to deal with *teacher* reassignments, it had promulgated none concerning reassignment of coaches and athletic directors. Jt. Ap. 65-66.

DISD Superintendent Linus Wright described transfers of athletic directors and coaches as occupying a "gray area," where matters were left up to him and his subordinates, and Wright had instituted "practices" to deal with such transfers. Jt. App. 68, 70. He could appoint a panel to hear the matter and make a recommendation, or there could be an informal hearing before him. Jt. App. 69. In either event Wright made the final ruling, and there was no appeal from his decision to transfer an athletic director or coach. Jt. App. 65, 69-70.

Superintendent Wright upholds Todd's decision

Following the March 15 meeting with Todd, Jett met with Kincaide. Tr. 21. Kincaide told Jett that, since he had received nothing in writing, he should return to the school However, as Jett was leaving Kincaide's office, he met

another administrator, who sent him to meet with John Santillo, DISD personnel director. After hearing Jett's story, Santillo told Jett that the damage was done and that he should allow himself to be removed from South Oak Cliff. When Jett protested, Santillo took him to meet with Wright. Tr. 271-275.

During this meeting, Jett told Wright and Santillo that he believed that Todd's recommendation was racially motivated. Jt. App. 71-72, 76. Wright's response was to suggest that Jett consider leaving the school, since he and Todd were having difficulty. Wright said that he had every confidence in Jett and that he would find him another position. Jt. App. 71-72.

On March 25, 1983, Wright convened a meeting with Santillo, Kincaide, Todd, and two other administrators. Jett was not invited since, according to Wright, the informal March 15 meeting had constituted the hearing required by Wright's transfer policy. Tr. 405. At the end of the meeting Wright officially ordered Jett removed as athletic/director coach. Jt. App. 72-73, 77.

The jury found that Wright's decision was "based wholly on Todd's recommendation without any independent investigation." Jt. App. 41, 46. Although there is evidence that Wright ordered Kincaide to investigate Jett's allegations, Kincaide apparently did not do this, once he learned that Jett had met with Wright and Santillo. Tr. 620, 627. Santillo testified that no investigation was in fact conducted. Jt. App. 77.

There was evidence from which the jury could conclude that Wright simply resolved the conflict in favor of the principal and that he made no attempt to decide if there was any truth to the allegation of racial discrimination. Jt. App. 68.

The Aftermath

Jett was reassigned to the Business Magnet High School because, he was told, it was the only position available. Tr. 279-280. Jett was undergoing a great deal of emotional stress, and the Business Magnet principal suggested that Jett take some time off. Tr. 291-292. When Santillo learned of this, he sent a letter to Jett expressing "disappointment" at Jett's attendance. Tr. 292-293.

When Jett received the letter, he went to Santillo, who

again took him to Wright. This time Wright told Jett that he would be "considered" for any head coaching positions that might come open. Tr. 293-294, 437-438.

On May 5, 1983, Santillo wrote Jett a letter and told him he was being placed on the "unassigned personnel" budget and that he had been assigned to the security department. While Jett should not expect to be able to remain in the department next year, Santillo said, Jett could "pursue" any available position for which he was certified. Further, if Jett was not recommended for a coaching position, he would be assigned as a classroom teacher. Jett decided that Wright did not intend to keep his promise to give him the next available head coaching job, and filed suit. Tr. 359, 371-372.

Subsequently, a head coaching job did open up at Madison High School; however, Jett was not contacted regarding that position, apparently because he had filed suit. Tr. 317-319, 452, 621-622.

On or about August 4, 1983, Jett received notice that he had been assigned to Thomas Jefferson High School as freshman football/track coach. Tr. 305-306. Jett resigned rather than accept this humiliating demotion. Tr. 307-311.

The remaining issues

Jett claimed several civil rights violations, only three of which are still before the Court.[1] First he alleged that the decision to transfer him because of his newspaper statements violated his First Amendment rights, and gave rise to a cause of action under 42 U.S.C. § 1983. Next he claimed that the decision to transfer him because he was white violated his Fourteenth Amendment equal protection right, again giving rise to a Section 1983 claim. With regard to the racially motivated transfer, Jett also claimed a violation of 42 U.S.C. § 1981.

Todd's liability under all three theories has been established. At issue here is only the liability of DISD.

[1] See Pet. App. 7-8 for the disposition of the other claims.

SUMMARY OF ARGUMENT

We answer the first question by determining Congressional intent. The Fifth Circuit approached the problem from the wrong direction. It sought the intent of the Congress which enacted Section 1983. Instead it should have sought the intent of the Congress which passed Section 1981.

The forerunner of Section 1983 was passed by the 42nd Congress in § 1 of the Ku Klux Klan Act of 1871. Section 1981, on the other hand, was enacted by an earlier Congress. The Fifth Circuit apparently reasoned that, by passing Section 1983, the 42nd Congress had somehow amended the earlier statute to impose Section 1983's "policy or custom" requirement onto that statute as well.

This reasoning quickly encounters difficulty. Congress normally amends an existing statute by express act. Absent this, amendment can only occur through a process analogous to "repeal by implication." Such repeals are not favored, and this is especially so where Reconstruction era civil rights statutes are involved. In our case there is no clear expression that the 42nd Congress intended to impose a "policy or custom" requirement on the already existing statute. On the contrary, there is strong indication that Congress intended for the two statutes to apply differently.

Section 1981 originated as § 1 of the 1866 Civil Rights Act, and the 1866 Congressional debates indicate that Congress passed this statute to secure a set of specific rights to the newly freed slaves. These rights were enumerated in the statute and, in the legal thinking of the day, were seen as "fundamental" or "natural" rights.

When the 1871 Congress drafted Section 1983, it modeled it after § 2 of the 1866 Act. It made an important change in wording, however. Instead of the specific list of "fundamental rights" secured by the 1866 statute, Section 1983 secured "any rights, privileges, or immunities secured by the Constitution." Ultimately this language was held not to cover the "fundamental rights" protected by the 1866 Act. Thus the 1871 Congress did not intend to amend Section 1981.

The proper way to construe Section 1981 is by reading the history and language of that statute, not Section 1983.

In other words, we must ask how Section 1981 would be construed if Section 1983 had never been passed.

First, however, we must know exactly what to look for. The question again is this: Does Section 1981 contain a "policy or custom" requirement? To answer this, we must first recall just how the *Monell* Court went about finding a "policy or custom" requirement in Section 1983. A review of *Monell* reveals that the Court derived the "policy or custom" requirement entirely from certain "crucial terms" of Section 1983.

These "crucial terms" provide an avenue of inquiry into the 1866 Civil Rights Act. In fact the "crucial terms" of Section 1983 come directly from § 2 of the 1866 Act. Does that mean that Congress intended to include a "policy or custom" requirement in § 2 of the 1866 Act? Probably not. Section 2 was a criminal statute, and because of this it's unlikely that Congress had a "policy or custom" requirement in mind in 1866.

Yet, even if we assume that § 2 of the 1866 Act somehow does embody a "policy or custom" requirement, that doesn't mean that a similar requirement appears in § 1.

Of course, the language of § 1 is totally different from § 2, and Section 1981 comes from § 1 of the 1866 Act, not § 2. Moreover, the "crucial terms" in § 2 are highly restrictive. Because this restrictive language was not placed in § 1, nor in any other part of the 1866 Act aside from § 2, it follows that Congress did not intend to impose the language-specific "policy or custom" requirement on § 1, and hence on the modern Section 1981.

Once we conclude Congress did not intend to impose a "policy or custom" requirement on Section 1981, we turn to the task of determining just what Congress did intend. As it turns out, there is no clear indication of Congressional intent that pertains to our problem. Under these circumstances there are two routes we can take. Both lead to the same place.

The first alternative is to read Section 1981 in the light of the common law principles that were widely known in 1866. This is the approach that the Court took in the Section 1983 immunity cases. The prevalent legal doctrine in the middle of the 19th Century turns out to be *respondeat superior*.

The second approach is to follow 42 U.S.C. § 1988, and either adopt the rule of the state in which the suit was filed or fashion a single federal rule. The applicable state law is Texas law, and there the doctrine of *respondeat superior* is strong. On the other hand, if the Court fashions a single federal rule, then general common law concepts must again be called upon, and again we wind up with *respondeat superior*.

In making its choice the Court is permitted to consider the policies behind the civil rights statutes. Certainly the policies of eliminating racial discrimination discouraging official misconduct, and compensating civil rights deprivations are well established. There are, however, other factors which the Court should also consider.

First, the Court's decade of struggle with *Monell's* "policy or custom" requirement should illustrate the need for a simple, widely understood standard. Again the rule of *respondeat superior* fits better than any other.

Second, recognition of a *respondeat superior* standard will not lead to an expansion of liability under Section 1981, such as occurred with Section 1983. Section 1983 has grown because of its broad language, which can arguably encompass almost any kind of government activity. Section 1981 has different language, however. It secures a narrow set of enumerated rights, and there is no danger that the scope of Section 1981 liability will become unmanageable.

Finally, we turn to the second Question Presented. As framed, the Question answers itself at least insofar as Section 1983 is concerned. Obviously we can't satisfy the "policy or custom" requirement unless Wright was a policymaker with regard to transfers of coaches. That's exactly what *Pembaur* says but, then again, that's exactly what the Fifth Circuit said in our case.

Analyzing the facts of our case in the light of *Pembaur* and *Praprotnik*, we ask first where applicable state law places the policymaking role. Our inquiry is necessarily brief. Texas statutes don't say whether school district superintendents can or cannot make policy. Nor does our record contain any direct evidence as to whether the DISD school board actually made such a delegation to Superinten-

dent Wright, although that fact can be inferred. The lack of direct evidence comes as no surprise, since the case was tried before *Pembaur*. Obviously, this part of the case must be retried, hopefully after further clarification of the "policy or custom" requirement.

ARGUMENT

I. A local government employee who claims job discrimination on the basis of race need not show that the discrimination resulted from official "policy or custom" to recover from the employer under 42 U.S.C. § 1981.

A. The "policy or custom" requirement arose from the language of 42 U.S.C. § 1983.

1. Background

In *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), the Court held that Chicago police officers acted under "color of law" when they invaded and ransacked a home without a search warrant. They were therefore liable under 42 U.S.C. § 1983. 365 U.S., at 171-187. Their municipal employer, however, was not liable, since Congress did not intend to include municipalities among the "persons" liable under Section 1983. 365 U.S., at 187-192.

Both *Monroe* holdings were based on the Court's reading of Congressional intent. Section 1983 "came onto the books as section 1 of the Ku Klux Act of April 20, 1871. 17 Stat 13," 365 U.S., at 171, and the Court relied on the 1871 Congressional debates to support its holding that policemen could act under "color of law", even though their actions might be contrary to the "ordinances or regulations" of their municipal employer. 365 U.S., at 171-183.

The *Monroe* court also examined the 1871 debates with regard to its second holding, i.e., that the City of Chicago was not a "person" liable under § 1983. There the Court focused on the debates over § 6 of the 1871 statute[2] rather than § 1. At issue was the amendment proposed by Representative Sherman which would have imposed liability upon "the county, city, or parish" in which certain violent acts occurred. 365 U.S., at 189 n. 41. The Sherman Amendment was defeated, and the *Monroe* Court concluded that

[2]Now 42 U.S.C. § 1986.

Congress' response to the proposed measure "was so antagonistic that we cannot believe" that Congress intended to include municipalities among the "persons" liable under §1 of the Act. 365 U.S., at 191.

Seventeen years later in *Monell v. Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978), the Court re-examined the Sherman Amendment debates and concluded that it had misread them in *Monroe*. "Congress *did* intend for municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S., at 690 (emphasis in original).

2. Origin of the "policy or custom" requirement

In Part II of *Monell* the Court began to define the newly recognized governmental liability. First it held that "a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." 436 U.S., at 691. It then formulated the standard by which local governments could be held liable—the now familiar "policy or custom" requirement. *Id.*, at 694-695. The Sherman Amendment debates, crucial to Part I of *Monell*, were called upon only once in Part II, to bolster the rejection of *respondeat superior*. 436 U.S. at 691 n. 57. They played no role in formulating the "policy or custom" requirement. Instead, throughout Part II of *Monell*, the Court relied exclusively on "the language of § 1983 as originally passed," i.e., § 1 of the Ku Klux Klan Act of 1871, which read as follows:

> *[A]ny person who*, under color of any law, statute, ordinance, regulation, custom, or usage of any State, *shall subject, or cause to be subjected* . . .

436 U.S., at 691 (emphasis the Court's). The Court wrote that this language "imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights." 436 U.S., at 692.

In *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, (1988), the Court again emphasized this language. There it wrote that "the crucial terms of the statute are those that provide for liability when a government 'subjects [a person], or causes [that person] to be subjected,' to a deprivation of constitutional rights." 108 S.Ct., at 923 (plurality). Thus, the

Court has twice emphasized the phrase "subject or cause to be subjected" and, understandably, this has led lower courts to focus on this phrase as the source of the "policy or custom" requirement. *See, e.g., Williams v. Butler*, No. 83-2534, No. 83-2641, 1988 WL 135650 (8th Cir., filed Dec. 21, 1988) (en banc).[3] Yet the Court has never said that this language alone comprises the "crucial terms" giving rise to the policy or custom requirement and, upon examination, it appears that the phrase "color of law, statute, ordinance, regulation, custom, or usage" also plays a role.

Apparently the Court reads section 1983 quite literally. The "person" is the local government; the phrase "under color of any law, statute, ordinance, regulation, custom or usage" means pursuant to "policy or custom"; and the phrase "subject or cause to be subjected" requires a causal relationship between this "policy or custom" on the one hand and the constitutional deprivation on the other. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427, 2433 (1985) ("This language tracks the language of the statute."), and *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1299, n. 10, 89 L.Ed. 2d 452 (1986).

Thus the phrase "under color of any law, statute, ordinance, regulation, custom or usage" is, if anything, more "crucial" to the "policy or custom" requirement than the "subject or cause to be subjected" language. Unfortunately, this "color of law" language has been given other meanings

---

[3] *On remand from, City of Little Rock v. Williams*, 108 S. Ct. 1102 (1988), *vacating, Williams v. Butler*, 802 F.2d 296 (8th Cir. 1986) (en banc), *on remand from, City of Little Rock v. Williams*, 475 U.S. 1105, 106 S.Ct. 1508, 89 L.Ed.2d 909 (1986), *vacating, Williams v. Butler*, 762 F.2d 73 (8th Cir. 1985) (en banc), *aff'g*, 746 F.2d 431 (8th Cir. 1984).

in other contexts.[4] This may be why the Court coined the phrase "policy or custom", as opposed to quoting the actual language of the statute.[5] This perhaps may also be why, when discussing the actual language of the statute, the Court has emphasized the phrase "subject or cause to be subjected."

B. Section 1983 did not amend Section 1981

1. Section 1981 was not passed by the 42nd Congress, but by an earlier Congress

In *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), the Court held that Section 1981 originated as § 1 of the Civil Rights Act of April 9, 1866, c. 31, 14 Stat 27. The *Runyon* dissent, however, argued that Section 1981 originated with § 16 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat 144. 427 U.S., at 195 (White, J., dissenting). While the court is presently reconsidering *Runyon*,[6] the final resolution of that controversy can make no difference here. Regardless of whether Section 1981

[4] In Section 1983 cases the phrase "color of any law, statute, ordinance, regulation, custom, or usage" "has consistently been treated as the same thing as state action required by the Fourteenth Amendment." *United States v. Price*, 393 U.S. 787, 794 n. 7, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1960). *See also, N.C.A.A. v. Tarkanian*, 109 S.Ct. 454, n.4 (1988), and cases there cited. *Cf. Adickes v. S. H. Kress Co.*, 398 U.S. 144, 166-167, 90 S.Ct. 1598, 2 L.Ed. 142 (1970). Compare these cases with *Monroe*, where it was argued that the Chicago policemen could not have acted under "color of law" since their actions in invading and ransacking the home were contrary to local law. 365 U.S., at 172. The Court rejected this argument, holding that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of state law.' " 365 U.S., at 184, quoting *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Thus, because the Chicago policemen misused the power given them by state law, they acted "under color of law." Yet, under *Monell* these same policemen, almost certainly, would not have been acting pursuant to their employer's "policy or custom." *Cf. Praprotnik*, 108 S.Ct., at 946 n. 19 (Stevens, J., dissenting).

[5] *Cf. Pembaur*, 106 S.Ct., at 1302 n.1 (Stevens, J., concurring).

[6] *See Patterson v. McLean Credit Union*, 108 S.Ct. 1419 (1988), *per curiam*.

originated with the 39th Congress in 1866, or with the 41st Congress in 1870, the fact remains that, when the 42nd Congress passed the Ku Klux Klan Act in 1871, Section 1981 was already, to use the words of *Monroe*, "on the books."

2. Absent clear historical evidence, one cannot conclude that, by passing Section 1983, Congress imposed a "policy or custom" requirement on Section 1981.

In our case, the Court of Appeals reasoned that "in 1871 when Congress enacted what is now codified as section 1983, which was five years after it had enacted the statute that became section 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy." 798 F.2d, at 762, Pet. App. 29A. Apparently the Fifth Circuit concluded that, when Congress passed the Ku Klux Klan Act in 1871, it intended to modify Section 1981 by imposing a "policy or custom" requirement on the already existing statute. Since Section 1981 was already "on the books" this argument raises all the difficult problems of "repeal by implication." Generally "repeals by implication are not favored,"[7] and the Court has uniformly rejected them in other cases involving Reconstruction era civil rights statutes.

In *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), the Court considered whether 42 U.S.C. § 1982, which prohibits discrimination in the sale of housing, applies to private parties. Section 1982 originated with § 1 of the Civil Rights Act of 1866, c. 31, 14 Stat 27, and it was re-enacted four years later by § 18 of the Enforcement Act of May 31, 1870, c. 114, 16 Stat 141. 392 U.S., at 423. In the interval between the two statutes, the States ratified the 14th Amendment which is, of course, limited to "state action." It was argued in *Jones* that, by re-enacting the 1866 Act as part of the 1870 Act, Congress

[7] *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 349, 80 L.Ed. 351 (1936); *United States v. Henderson*, 78 U.S. 652, 565-658, 11 Wall 652, 20 L.Ed.2d 235 (1870); and annotation at 4 L.R.A. 308.

meant to incorporate a "state action" requirement into the statute . 392 U.S., at 436. The Court rejected this argument. Citing the absence of historical support, the Court refused to conclude "that Congress made a silent decision in 1870 to exempt private discrimination from the operation of the Civil Rights Act of 1866." 392 U.S., at 437.

In *United States v. Mosley*, 238 U.S. 383, 386-387, 35 S.Ct. 904, 59 L.Ed. 1355 (1915), two Oklahoma election judges were charged with conspiring not to count votes in a Congressional election. The charge was brought under § 6 of the Act of May 31, 1870, which made it a crime for two or more persons to conspire "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States."[8]

Here, unlike *Jones*, there was abundant historical evidence that Congress *had* intended to repeal § 6 of the 1870 Act, at least insofar as it applied to voting. In 1894 Congress had passed "An Act to repeal all statutes relating to supervisors of elections. . ." 28 Stat. at L. 36, ch. 25, Comp. Stat 1913, § 1015. At one stroke it systematically repealed every federal statute which expressly dealt with voting. The list of repealed statutes included § 4 of the 1870 Act, which made it a crime to use "force, bribery, threats, intimidation, or other unlawful means [to] hinder, delay, prevent, or obstruct ... any citizen" from voting or qualifying to

[8] 16 Stat 141, § 6, later R. S. § 5508. By the time of *Mosley* this section had become § 19 of the Criminal Code of March 4, 1909, c. 321, 35 Stat. at L. 1092. It's now 18 U.S.C. § 241. *See, generally, United States v. Williams*, 341 U.S. 70, 83, 71 S.Ct. 581, 95 L.Ed. 758 (1951).

vote.[9] *See Mosley*, 238 U.S. at 389 (Lamar, J., dissenting); *United States v. Gradwell*, 243 U.S. 476, 483-484, 37 S.Ct. 407, 61 L.Ed. 857 (1917); and *United States v. Classic*, 313 U.S. 299, 334-335, 61 S.Ct. 1031, 85 L.Ed. 1368 (1940). Moreover, the 1894 Congressional debates reflected a clear intent to exclude all aspects of voting from the protection of the civil rights laws. 238 U.S., at 390-391. Despite this manifestation of legislative intent, the *Mosley* Court concluded that § 6 had not been repealed or narrowed by the 1894 statute. It thus permitted the election judges to be prosecuted.

As a final example, we turn to *Lynch v. Household Finance Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), where the Court considered the history of 28 U.S.C. § 1343(3), the "jurisdictional counterpart" of § 1983. 405 U.S., at 543. That statute gives federal courts jurisdiction over "any civil action" to redress a deprivation of civil rights, and it contains no amount-in-controversy requirement. *See, generally, Lynch*, 405 U.S., at 543 n. 7, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 607, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). In 1875 Congress passed the forerunner of 28 U.S.C. § 1331 which, for the first time, gave federal courts general jurisdiction over all civil suits "arising under the Constitution and laws of the United States." 405 U.S. at 546. That statute originally imposed a minimum jurisdictional limit of $500, which was periodically increased until it had reached $10,000 at the time of *Lynch*. 405 U.S., at 546 n. 12.[10]

Early cases construed these statutes by distinguishing between "personal rights" and "property rights". Suits to redress deprivations of "personal rights" were covered by the 1871 Ku Klux Klan Act . Actions involving "property rights", on the other hand, were deemed to arise under the

[9] In the Revised Statutes, §§ 4 and 6 of the 1870 Act were placed in Title 70, Chapter Seven, entitled "Crimes Against the Elective Franchise and Civil Rights of Citizens." Thus, § 4 of the 1870 statute became R.S. § 5506, while § 6 became R.S. § 5508. See Revisor's Notes to ch. 7 of Revised Statutes.

[10] The amount in controversy requirement was deleted in 1980. Pub. L. 96-486, § 2 (a), 94 Stat 2349.

1875 federal question statute, and thus had to meet its amount-in-controvesy requirement. 405 U.S., at 546-547. The *Lynch* Court overruled these cases. The two statutes were independent, and the 1871 statute covered suits to redress deprivations of "any rights, privileges, or immunities secured by the Constitution," including "property rights." To hold otherwise, one would have to reason that, when it enacted the 1875 statute, Congress "intended to narrow the scope of a provision passed four years earlier as part of major civil rights legislation." 405 U.S., at 548. The Court, citing the prohibition against repeals by implication, "refus[ed] to pare down § 1343(3) jurisdiction." 405 U.S., at 549.

Finally, the Court has generally refused to conclude that modern civil rights statutes have narrowed the scope of the Reconstruction era statutes. *See, Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S. 366, 377, 99 S.Ct. 2345, 2351, 60 L.Ed.2d 957 (1979), and *Id.*, 442 U.S., at 391 (White, J., dissenting). *See also, Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1971), and *Waters v. Wisconsin Steel Works of International Harvestor Company*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970).

These principles apply to our case. We cannot assume that the 42nd Congress made a silent decision to impose a "policy or custom" requirement onto Section 1981 when it enacted Section 1983. To conclude that Section 1983 somehow amended Section 1981, we must have clear historical evidence. The historical evidence that does exist, however, points in the opposite direction.

3. Congress did not intend for Section 1983 to amend Section 1981.

The Fifth Circuit concluded in our case that "Congress did not intend to impose different types of liability on a municipality based on the particular 'federal' wrong asserted." Pet. App. 29A. However, even if that were so it would not justify a repeal by implication which, as we have seen, requires strong evidence of an *affirmative* intent to repeal. Even so, the Fifth Circuit's reading of Congressional intent is probably wrong. There's evidence that the rights

secured by the 1866 Act were viewed quite differently from the rights secured by the 1871 Act and that the two statutes were passed to meet different needs. And while the views involved may not have survived as viable legal theories, they do reveal the intent of those that held them. *Cf. Monell*, 436 U.S., at 676.

As the 1866 debates make clear, the Civil Rights Act of 1866 was intended to secure certain *specific* rights to the newly freed slaves. Cong. Globe, 39th Cong., 1st Sess., 41 (remarks of Rep. Sherman), 474-475 (Sen. Trumbull), 504 (Sen. Howard). These rights were regarded as "fundamental" or "inalienable" or "natural". *Id.*, 474-475 (Sen. Trumbull), 1118-1119 (Rep. Wilson). The idea had been discussed by Justice Washington, on circuit, in *Corfield v. Coryell*, 4 Wash. C.C. 371, 6 Fed. Cas. 546, 551-552 (1823), and Senator Trumbull read from that opinion on the Senate floor. Cong. Globe, 39th Cong., 1st Sess., 475. *See, generally, United States v. Morris*, 125 F. 322, 325-326 (E.D. Ark. 1903), and cases there cited. *See also, Jones*, 392 U.S., at 441, 465, 466.

Section 1 of the statute, as originally introduced, read as follows:

> There shall be no *discrimination in civil rights or immunities* among the inhabitants of any State or Territory of the United States on account of race, color or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime . . . shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding.

Cong. Globe, 39th Cong., 1st sess., 211 (emphasis added). During the ensuing debate questions were raised concerning the scope of the phrase "civil rights and immunities." The Act's proponents insisted that this language referred

to "fundamental rights." Opponents, however, feared it might also encompass "political rights", including the right to vote.

Thus, after Sen. Trumbull had equated "civil rights and immunities" with "fundamental rights", *Id.*, 474-475, the following exchange took place:

> MR. McDOUGALL: . . . Do I understand that it is not designed to involve the question of political rights?
>
> MR. TRUMBULL: This bill has nothing to do with the political rights or status of parties. It is confined exclusively to their civil rights such as appertain to every free man.

Id., 476. Opponents were not convinced by Senator Trumbull's assurances, however. Senator Saulsbury drew the distinction between "rights which we derive from nature" and "rights which we derive from government." *Id.*, 477. He went on to note that "[t]he right to vote is not a natural right." *Id.*, 478. He then read the "civil rights and immunities" language and remarked that "the question is not what [Sen. Trumbull] means but what the courts will say the law means." *Id.*, 478. *See also, Id.*, 1117, 1151.

Eventually there was a compromise. On the eve of final passage, the bill was amended to delete the reference to "civil rights or immunities". *Id.*, 1367-1368. *See also, General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 388 n. 15, 102 S.Ct. 3141, 3149, 73 L.Ed.2d 835 (1982). This left § 1 as protecting a specific list of enumerated rights, which Congress viewed as "natural rights."

Five years later, when Congress drafted § 1 of the Ku Klux Klan Act, it modeled it after § 2 of the 1866 Act,[11] which read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected, any inhabitant of any State or Territory to the deprivation of *any right secured by this act* . . . shall be deemed guilty of a misdemeanor . . .

[11] *See Lynch*, 405 U.S., at 545.

c. 114, 14 Stat 27, § 2 (emphasis added). The "rights secured by this act" were obviously the "natural rights" enumerated in § 1. The 1871 Congress, however, deleted that language and substituted the phrase "any rights, privileges, or immunities secured by the Constitution."

While there was controversy as to what these words meant, their meaning was ultimately decided, to quote Senator Saulsbury, by "what the Courts will say." In the *Slaughter-House Cases*, 83 U.S. 36, 75-80, 16 Wall 1136, 21 L.Ed. 394 (1872), the Court construed the Fourteenth Amendment's "privileges and immunities" clause to include only those rights which arose or grew out of the citizen's relationship with the national government. The Court expressly rejected the argument that "privileges and immunities" includes "natural rights," 83 U.S. at 75-76, and this same construction was later given the "rights, privileges, and immunities" language of § 1983. *See Hague v. C.I.O.*, 307 U.S. 496, 511, 59 S.Ct. 954, 83 L.Ed. 1423 (1939), and 307 U.S., at 520 (Stone, J., concurring).

Thus, we can conclude that Congress did not intend, by enacting § 1 of the Ku Klux Klan Act, to secure the same rights secured by the 1866 Act. *See, generally, District of Columbia v. Carter*, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed.2d 613 (1973), and cases cited at our Petition, p.15.

C. The history and language of Section 1981 show that Congress did not intend to include a "policy or custom" requirement in that statute.

To construe Section 1981, we must look to the history and language of that statute, not Section 1983. Unfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language.

We know that the *Monell* Court relied exclusively on the language of Section 1983 to derive the "policy or custom" requirement. See Part IA2 above. We also know that Section 1983 was modeled after § 2 of the 1866 Act. See part IB3. This hints that § 2 of the 1866 Act might itself contain a "policy or custom" requirement. This possibility deserves examiniation, since Section 1981 originated in the preceding section (§ 1) of that same 1866 Act.

Again, we examine the specific language of § 2 of the 1866 Act:

> That any person who, *under color of any law, statute, ordinance, regulation, or custom, shall subject or cause to be subjected*, any inhabitant of any State or Territory to the deprivation of any right secured by this act . . . shall be deemed guilty of a misdemeanor.

c. 114, 14 Stat 27, § 2 (emphasis added). Obviously, the emphasized language comprises the "crucial terms" from which the *Monell* Court inferred the "policy or custom" requirement. See Part IA2 above. Yet, there is a vast difference between § 2 of the 1866 Act and the modern Section 1983. The former was a criminal statute, the direct ancestor of the modern 18 U.S.C. § 242.[12] Since the notion of criminal liability of a city was unknown at the time, it seems unlikely that the 39th Congress had any kind of "policy or custom" requirement in mind when it enacted § 2 of the 1866 Act.

If the Court agrees, then this part of the argument need not continue. Since the "policy or custom" requirement arises from the "crucial terms" of § 1983, and since Congress could not have meant "policy or custom" at the only place where it used those "crucial terms" in the 1866 Act, then Congress could not have intended to impose a "policy or custom" requirement anywhere in that statute.

If, on the other hand, we assume that, by including the "crucial terms" in § 2 of the 1866 Act, Congress *did* intend to impose a "policy or custom" requirement on *that* section, it does *not* follow that such a requirement should be read into § 1 as well. Indeed, it's more plausible to conclude that Congress did *not* intend to impose such a requirement on § 1, or on any other part of the 1866 Act, except for § 2.

The restrictive language of § 2 stands in sharp contrast to the rest of the 1866 Act. Neither the phrase "color of ar law, statute, ordinance, regulation, or custom", nor the words "subject or cause to be subjected", are found in any

[12] *See Screws v. United States*, 325 U.S. 91, 98, 65 S.Ct. 1031, 89 L.Ed. 1495, 162 A.L.R. 1330 (1945); *United States v. Williams*, 341 U.S., at 83, and *Classic*, 313 U.S., at 327 n. 10.

of the other sections. And while the Court has not dealt with the absence of the phrase "subject or cause to be subjected," it has on several occasions drawn meaning from the fact that the "color of law" language appears *only* in § 2. It is to these cases that we now turn.[13]

Again our simplest example is found in *Jones*, 392 U.S. 409, which construed Section 1982, a statute that also arose from § 1 of the 1866 Act. In deciding that § 1 of the 1866 Act reaches private conduct, the Court reasoned that, if § 1 had been intended to reach only governmental conduct, "then much of § 2 would have made no sense at all." 392 U.S., at 424. The Court illustrated its point by quoting § 2 verbatim and emphasizing the "color of law" language. 392 U.S., at 424 n. 32. Since the "color of law" language was present in § 2, but not in § 1, Congress must have intended for § 1 to reach more than conduct committed under "color of law", i.e., private conduct.

Congress also omitted the "color of law" and "subject or cause to be subjected" language from § 6 of the 1866 Act, which imposed criminal penalties on "any person who shall knowingly and willfully obstruct, hinder, or prevent" the arrest of a person charged with violating the statute. c. 31, 14 Stat 28, § 6.

While we find no case construing § 6, both it and § 2 were carried forward to the 1870 Act.[14] There § 17 (re-enacting § 2 of the 1866 Act) contains the "color of law" and "subject or cause to be subjected" language, while § 11 (re-enacting § 6 of the 1866 Act) still applies to "any person." c. 114, 16 Stat 142, § 11, 144 § 17. Moreover, the 1870 Act contains several new sections which, like § 11, also impose criminal penalties on "any person" or "persons." These are §§ 4, 5, and 6, c. 114, 16 Stat. 141, which became §§ 5506, 5507, and 5508 of the Revised Statutes.

[13] Bearing in mind, of course, the ambiguous nature of the "color of law" language. See footnote 4 above.

[14] This part of the argument is particularly important if the view of the *Runyon* dissent should prevail. Under that view § 1981 arose from § 16 of the 1870 Act, and not § 1 of the 1866 Act. *See Runyon*, 427 U.S., at 195-211 (White, J., dissenting).

Section 6 of the 1870 Act (R.S. § 5508) made it a crime if "two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." This is the original version of the modern 18 U.S.C. § 241, *United States v. Williams*, 341 U.S. 70, at 83, 71 S.Ct. 581, 95 L.Ed. 758 (1950), and it has long been settled that § 241 reaches private conduct. 341 U.S., at 75-76 (plurality), *Id.*, at 93 (Douglas, J., concurring).

Again this conclusion depends on the absence of the "color of law" language from § 6. Since conspiracies under color of law are reached by § 17 of the 1870 statute (§ 2 of the 1866 Act), it follows that "the principal purpose of § 6, unlike § 17, was to reach private action rather than officers of a State." 341 U.S. at 75-76 (plurality). *See, generally, Griffin v. Breckenridge*, 403 U.S. 88, 104, 91 S.Ct. 1790, 29 L.Ed.2d 388 (1971), and cases there cited.

Finally, we note §§ 4 and 5 of the 1870 Act (R.S. §§ 5506 & 5507), which also apply to "any person." These sections were passed to enforce the 15th Amendment, which provides that "[t]he right of Citizens of the United States to vote shall not be denied or abridged *by the United States or by any state* on account of race, color or previous condition of servitude." (emphasis added)

In *James v. Bowman*, 190 U.S. 127, 23 S.Ct. 678, 47 L.Ed. 979 (1903), the Court considered an indictment brought under § 5 of the 1870 statute (R.S. § 5507), which made it an offense for "any person" to "prevent, hinder, control, or intimidate, any person from exercising . . . the right of sufferage, to whom the right of sufferage is secured or guaranteed by the [15th Amendment]." c. 114, 16 Stat 141, § 5.

The Court read the 15th Amendment as giving Congress only the authority to legislate with regard to actions taken "by the United States or by any state," a requirement analogous to the "state action" requirement of the

14th Amendment, 190 U.S., at 136-137. Since § 5 of the 1870 Act (R.S. § 5507) did not confine itself to "state action" it was overbroad. Moreover, the Court refused to preserve its constitutionality by reading in a "state action" requirement. There were "no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the 15th Amendment." 190 U.S., at 140, quoting *United States v. Reese*, 92 U.S. 214, 2 Otto 214, 23 L.Ed. 563 (1875). Obviously, the missing "words of limitation" were to be found in the "color of law" language, then located in § 17 of the 1870 Act (§ 2 of the 1866 Act). The Court said it "must take these sections of the statute as they are," 190 U.S., at 141, and it refused to "disregard . . . words that are in the section" and to "insert . . . words that are not in the section." "The language is plain," the Court wrote. "There is no room for construction." *Id. See also, United States v. Reese*, 92 U.S. 214, which struck down § 4 of the 1870 Act (R.S. § 5506) on similar grounds.

We have seen in Part IA2 that the "policy or custom" requirement stems from certain "crucial terms." These cases here show that, if Congress really meant to impose a "policy or custom" requirement by including these "crucial terms" in § 2 of the 1866 Act, then its decision not to include them in § 1, or any other part of the 1866 Act, means that Congress intended that § 1—hence Section 1981—would *not* contain a "policy or custom" requirement.

We also note that the literal reading given the sections involved in these cases is consistent with the maxim that a Reconstruction era civil rights statute must be given "a sweep as broad as its language", *Jones*, 392 U.S., at 437, quoting, *United States v. Price*, 393 U.S. 787, at 801, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1960). To read the "crucial terms" into § 1 of the 1866 Act, when they simply do not appear there,

would fly in the face of this established approach to the Reconstruction era statutes. Ultimately, to read a "policy or custom" requirement into Section 1981 would be "to seek ingenious analytical instruments" to carve an exception from Section 1981 that simply was never intended. *Jones*, 392 U.S., at 437, quoting *Price*, 383 U.S., at 801.

II. The familiar rule of *respondeat superior* offers the most suitable standard for § 1981 liability.

In Part I we demonstrated that Congress did not intend to impose a *Monell* style "policy or custom" requirement on Section 1981. Now we inquire as to what Congress did intend.

A. Considerations of legislative intent require imposition of a *respondeat superior* standard.

Legislative intent can be drawn from Congress' silence. This was the approach taken in the Section 1983 cases involving immunities. There, although the statute was silent on the immunity issue, the Court inferred legislative intent from the fact that, in the year 1871, questions of legislative and judicial immunity were viewed as "settled principles." *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967) (judicial immunity). The Court refused to believe that Congress "would impinge on a tradition so well grounded in history and reason" without mentioning it in the language of the statute. *Tenny v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 95 L.Ed. 1019 (1951) (legislative immunity).[15] On the other hand, the Court found "no tradition" of qualified good faith immunity for municipal corporations and thus refused to impose it. *Owen v. City of Independence*, 445 U.S. 622, 638, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).[16]

[15] *See also, Scheurer v. Rhodes*, 416 U.S. 232, 243-245, 94 S.Ct. 1683, 40 L.Ed. 90 (1974); *Wood v. Strickland*, 420 U.S. 308, 316-319, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); and *Imbler v. Patchman*, 424 U.S. 409, 417-424, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976).

[16] *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed. 616 (1981) (city immune from punitive damages).

This approach allows Section 1981 to be read in light of the "settled principles" of 1866 (or 1870 if the *Runyon* dissent is correct). As it turns out, the prevailing notion of municipal liability in the middle of the 19th Century was the familiar rule of *respondeat superior*. This was demonstrated by the *Tuttle* dissent, 471 U.S., at 834-839 (Stevens, J., dissenting)[17], and this area has been ably explored in Part I B of the *amicus curiae* brief of the NAACP Legal Defense Fund in our case. Of course, *Tuttle* was a Section 1983 case, and the dissent there could not overcome the language of the statute. Here matters are different.

B. 42 U.S.C. § 1988 also compels adoption of a *respondeat superior* standard

A second avenue of inquiry acknowledges the fact that private causes of action under Sections 1981 and 1982 do not arise from the express language of those statutes. Rather in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), the Court held that in "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.*, at 239.[18] The *Sullivan* Court went on to say that in fashioning a private remedy under Sections 1981 and 1982, "both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes." 396 U.S., at 240. In support of its approach, the Court cited 42 U.S.C. § 1988, which directs the district courts to exercise their jurisdic-

[17] We incorrectly cited *Praprotnik*, 108 U.S. 937 (Stevens, J., dissenting), for this proposition in our Petition, p. 26.

[18] *See also, Jones v. Alfred H. Mayer Co.*, 392 U.S., at 414 & n.13, and *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-460, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (§ 1981). *See, generally, Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). One can also argue that Section 1981 and 1982 claims are *expressly* allowed by § 3 of the 1866 Civil Rights Act, which provides that "the district courts of the United States shall have . . . cognizance . . . of all causes, civil and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act." c. 31, 14 Stat 27. *See Cannon*, 441 U.S., at 736 n. 7 (Powell, J., dissenting). For purposes of our argument, however, that approach leads to the same place as the argument based upon the implied cause of action, i.e., to 42 U.S.C. § 1988, the modern version of § 3 of the 1866 Act.

tion to enforce the civil rights laws. . .

> . . . in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil and criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

After *Sullivan*, the Court applied Section 1988 to hold that questions of limitations under Section 1981 are to be governed by "appropriate" state law. *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975). The Court cautioned, however, that "considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." 421 U.S., at 465.

This was also the approach in *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973), where the Court refused to allow a county to be held liable under Section 1983 for the constitutional torts of its sheriff. While state law expressly allowed counties to be held liable for the civil rights violations, this feature could not be incorporated into Section 1983, since the result would be "less than consistent" with *Monroe v. Pape*. 411 U.S., at 706. The *Moor* Court reasoned that, because of the *Monroe* decision, its case was "a wholly different case from those in which, lacking any clear expression of congressional will, we have been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law." *Id.*, 411 U.S., at 701 n. 12.

Of course, in our case there is no "clear expression of Congressional will". As we showed in Part I, *Monell's* "policy or custom" requirement is inapposite to Section 1981. Thus, the Court is perfectly free to look to state law or to fashion

"a single federal rule."[19]

Texas law leads us unhesitatingly to a rule of *respondeat superior*.[20] Similarly, in adopting a single federal standard the Court must also defer to common law principles. *Cf. Carey v. Piphus*, 435 U.S. 247, 252-259, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).

C. Policy arguments favor adoption of a *respondeat superior* standard.

Whatever course it takes, the Court will ultimately have to address the policy implications of its decision.

1. A rule of *respondeat superior* will further the policies of eradicating racial discrimination, compensating for civil rights deprivations, and deterring abuses of power.

The policy behind Section 1981 is easily understood after reading *Jones*. The policies of compensation and deterrence are closely related, and have been explored at length in

---

[19] *Cf. Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) (survivorship); *Carlson v. Green*, 446 U.S. 14, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (survivorship); *Occidental Life Ins. Co. v. E.E.O.C.*, 432 U.S. 355, 97 S.Ct. 2447, 53 L.Ed.2d 402 (1977) (limitations); *Board of Regents v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980) (limitations); *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984) (limitations); *Wilson v. Garcia*, 471 U.S. 260, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (limitations); and *Fielder v. Casey*, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (notice of claim).

[20] *City of Galveston v. Posnainsky*, 62 Tex. 118 (Tex. 1884); *White v. City of San Antonio*, 94 Tex. 313, 60 S.W. 426 (1901); *City of Wichita Falls v. Lewis*, 68 S.W.2d 388 (Tex. Civ. App. - Fort Worth 1934, writ dism'd); *Schroggins v. City of Harlingen*, 131 Tex. 237, 112 S.W.2d 1035 (1938); *City of Houston v. Quinones*, 142 Tex. 282, 177 S.W.2d 259 (1943); *Bates v. City of Houston*, 189 S.W.2d 17 (Tex. Civ. App. -Galveston 1945, writ ref'd w.o.m.); *Dilley v. City of Houston*, 148 Tex. 191, 222 S.W.2d 992 (1949); *City of Midland v. Hamlin*, 239 S.W.2d 159 (Tex. Civ. App. - El Paso 1950, no writ); *Crow v. City of San Antonio*, 294 S.W.2d 899 (Tex. Civ. App. - San Antonio 1956, no writ); *City of Orange v. LaCoste, Inc.*, 210 F.2d 939 (5th Cir. 1954); *Sarmiento v. City of Corpus Christi*, 465 S.W.2d 813 (Tex. Civ. App. - Corpus Christi 1971, no writ); *Contrelli Trust v. City of McAllen*, 465 S.W.2d 804 (Tex. 1971); *City of Round Rock v. Smith*, 687 S.W.2d 300 (Tex. 1985); *City of Gladewater v. Pike*, 727 S.W.2d 514 (Tex. 1987).

cases arising under Section 1983, as well as *Bivens* style actions.[21]

2. *Respondeat superior* provides a clear, easily applied legal standard.

Ten years after *Monell*, Section 1983 litigants are still "confronted with a legal landscape whose contours are 'in a state of evolving definition and uncertainty'." *Praprotnik*, 108 S.Ct., at 922 (plurality), quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256, 101 S.Ct. 2748, 2754, 69 L.Ed.2d 616 (1981). Of course, the Court had no choice in deciding *Monell*, since the language of § 1983 represents a "clear expression of Congressional will." Here, however, there is no such imperative. The Court is writing on a clean slate and, for over a century, *respondeat superior* has provided a simple, widely understood, easily applied rule of law.

3. The policies that favor restricting liability under Section 1983 do not apply to Section 1981

In the century since the *Slaughter-House Cases*, the "rights, privileges, and immunities secured by the Constitution" have expanded tremendously. The Court has "widened the scope of Section 1983 by recognizing constitutional rights that were unheard of in 1871." *Praprotnik*, 108 S.Ct., at 923.

The vague language of Section 1983 has provided no "logical stopping place", and the Court has become alarmed that Section 1983 might become a "font of tort law" where "every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establish[es] a violation of the Fourteenth Amendment." *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976). *See also, Parratt v. Taylor*, 451 U.S. 527, 546-553, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (Powell, J. concurring).

[21] *See Monroe*, 365 U.S., at 651-656; *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); *Mitchum v. Foster*, 407 U.S. 225, 238-242, 91 S.Ct. 2151, 32 L.Ed.2d 705 (1972); *Carey*, 435 U.S., at 254-257; *Robertson v. Wegmann*, 436 U.S., at 590-591; *Butz v. Economou*, 438 U.S. 478, 506, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Owen*, 445 U.S. at 651-656; *Carlson v. Green*, 446 U.S. 18, *Newport v. Fact Concerts, Inc.*, 453 U.S., at 269.

These concerns are not pertinent here. The specific, enumerated rights of Section 1981 stand in sharp contrast to the vague "rights, privileges, and immunities" secured by Section 1983. The language of Section 1981 *does* provide a "logical stopping place."

4. Other alternatives

If, despite our arguments, the Court decides to draw the line somewhere short of *respondeat superior*, then see our Petition, p. 27, for another approach to the problem.

III. There was evidence from which the jury could conclude that Superintendent Wright was a "policymaker" with regard to transfers of coaches and athletic directors.

Once the references to Section 1981 are removed, the "Question Presented" by the Cross-Petitioner is easily answered. *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1299, 89 L.Ed.2d 452 (1986), teaches that DISD would not be liable under Section 1983, unless Superintendent Wright was the official charged with making policy to govern transfers of coaches and athletic directors. If Wright were not a policymaker, as the Question Presented assumes, then obviously the district would not be liable.

Of course, this is exactly what the Court of Appeals said. The Fifth Circuit held that the jury instruction concerning municipal liability was deficient "because it did not state that the city could be bound by the principal or superintendent only if he was a designated policymaking authority." Pet. App. 21A. The discussion that follows[22] concludes that "Wright's final exclusive authority to make discrete individual transfer decisions would not alone subject the DISD to responsibility . . . *unless* he *also* had final authority with respect to general DISD transfer *policy* .." Pet. App. 23A (emphasis in original).

The correct question, obviously, is whether Wright was the official charged with making policy to govern such transfers. The Court in *City of St. Louis v. Praprotnik*, 108 S.Ct. 915, 924-925 (1988), said that this is a question of state law, but Texas law can only take us so far.

[22] The following line was omitted from the beginning of the text at Pet. App. 22A: "...sole and unreviewable authority to reassign teachers in..."

Under Texas law a school district's board of trustees has "the exclusive power to manage and govern the free public schools of the district." Tex. Educ. Code section 23.26(b) (Vernon's 1987). At the time our suit was filed, however, there was no Texas statute dealing with the powers and duties of the superintendent Linus Wright testified that, as superintendent, he was the chief executive officer of the district, accountable only to the school board itself. Tr. 381-382. This accords with a subsequently adopted statute designating the superintendent as "the educational leader and the administrative manager of the school district." Tex. Educ. Code section 13.351 (a) (Vernon's Supp. 1989).

Section 23.26(d) of the Education Code authorizes the trustees to "adopt such rules, regulations, and by-laws as they may deem proper" and this, along with 23.36(b) quoted above, authorizes the board to delegate its powers. *See Corpus Christi Independent School Dist. v. Padilla*, 709 S.W.2d 700, 707 [syl. 16] (Tex. App. - Corpus Christi 1986, no writ).

While our record does not show that the DISD board expressly gave Wright authority to make policy with regard to transfers of coaches and athletic directors, it does allow such an inference. While the Board approved policies to deal with transfers of teachers, it promulgated none to deal with transfers of coaches and athletic directors. Jt. App. 65-67. Wright described such transfers as a "gray area" where matters were left up to him and his subordinates. Jt. App. 70.

Moreover, unlike any of the cases which the Court has heard, Wright actually promulgated policies to deal with coach/athletic director transfers, Jt. App. 68, 70, some of which were formal in nature. Tr. 403-405. *Cf. Praprotnik*, 108 S.Ct., at 933 (Brennan, J., concurring). Finally, unlike *Praprotnik*, Wright was actually the final decisionmaker. There was absolutely no recourse from his decision to transfer Jett. Jt. App. 65, 69-70. *Cf., Praprotnik*, 108 S.Ct., at 926 [syl. 8, 9] (plurality). And, of course, he was the chief executive officer of the school district.

Frankly, it's difficult to imagine how much stronger the evidence could be, save for an actual board resolution expressly delegating policymaking power to Wright. That the evidence on this point is not fully developed should come

as no surprise. The case was tried in October of 1984, before *Pembaur*. (and before *Tuttle*). If Jett must make further proof that Wright was a "policymaker", then he should have that opportunity when this part of the case is retried.

CONCLUSION

The Court should affirm Petitioner's Section 1981 recovery against Respondent. The Section 1983 portion of the case should be remanded for retrial with appropriate instructions, as was done in *Tuttle*, 471 U.S., at 824, and *Praprotnik*, 108 S.Ct., at 928.

Respectfully submitted,

FRANK GILSTRAP
FRANK HILL
SHANE GOETZ
Hill, Heard, Oneal,
Gilstrap & Goetz
1400 West Abram
Arlington, Texas 76013
(817) 261-2222